



DATE: MAY 31, 1989
CASE NO. 87-INA-721

IN THE MATTER OF

SIEGFRED SANDER,
Employer

on behalf of

MAYRA AQUINO,
Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge;
Guill, Associate Chief Judge; and Brenner, Tureck, and Williams,
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Benjamin Bustos' denial of a labor certification application pursuant to 20 C.F.R. §656.26.¹

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the

¹ All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for administrative - judicial review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

Employer filed an application for alien employment certification for a full-time live-in domestic-housekeeper on October 29, 1985 (AF 21). The duties of the job included cooking two main meals a day (except on weekends), and normal household chores. At the time of application, the Employer was 83 years old. He requested certification noting his age and contending that he needed someone to aid him in running his home and taking care of his "personal needs, both hygienic as well as medicinal." (AF 8) He added that his wife used to do these things for him, but that since her death he needs a housekeeper to help him (*id.*).

On June 25, 1987, a Notice of Findings ("NOF") was issued by the Certifying Officer ("CO") alleging that, since the Dictionary of Occupational Titles does not list "live-in" as a normal requirement of the occupation of household domestic, business necessity for this requirement would have to be established under §656.21(b)(2) (AF 22). The CO added that the job apparently could be performed on a normal live-out, eight-to-four or nine-to-five schedule despite the fact that the job's hours were listed as from 8-11 a.m. and 4-9 p.m. Monday to Friday, and 6-10 p.m. on Saturday. She dismissed the split-shift hours as being unduly restrictive without any explanation (*see id.*). Following a short rebuttal letter in which the Employer reiterated his previously stated reasons for needing a live-in housekeeper (AF 23), the CO denied certification on August 4, 1987, briefly stating that Employer's rebuttal did not justify the live-in requirement. A timely request for review was filed on Employer's behalf (AF 25).

Discussion

The CO's denial of certification was premised on a finding that this job, which was listed as covering a 13-hour period (with a five-hour break) each day, could nonetheless be performed on a normal eight-to-four or nine-to-five schedule. Although Employer's letters justifying the position (AF 8, 15) are not very detailed, they are sufficient to explain, if any explanation is necessary, why an 83-year old widower needs a live-in housekeeper. In light of Employer's explanation, it was incumbent on the CO to offer some explanation of how this job could be performed in one continuous eight-hour period daily and without the employee living in. But the CO completely failed to explain why the job duties do not justify a live-in housekeeper. Accordingly, we hold that the Employer has established the business necessity of the live-in requirement. Therefore, the denial of certification is reversed.

ORDER

The Certifying Officer's denial of alien labor certification is reversed, and certification is granted.

JEFFREY TURECK
Administrative Law Judge

JT/jb

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Judge Guill dissenting:

The failure of the CO to provide reasons for determining that Employer's needs could be met by a domestic worker working a straight through 8 hour per day shift is not justification for the Board to summarily conclude that Employer needs a live-in domestic worker. Rather, it is cause to remand the matter back to the CO for her to provide the reasons for justifying the denial.